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No. 419

In the Supreme Court of the United States

OCTOBER TERM, 1960

LINUS PAULING, PETITIONER

v.

[illegible]OUS O. EASTLAND, THOMAS J. DODD, OLIVER GASCH AND JOSEPH C. DUKE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court did not file a written opinion. In the *per curiam* order of the Court of Appeals of September 6, 1960, affirming the judgment of the District Court (Pet. App. 1a), Chief Judge Prettyman and Judges Bazelon and Bastian each reserved the right to file a statement of his views. Chief Judge Prettyman, on September 7, filed a memorandum statement of his views, not yet reported, which appears in Pet. App. 2a–8a. In a *per curiam* order filed September 14 (App., *infra*, p. 17), Judges Bazelon and Bastian decided not to file separate statements of their views. Judge Bastian, however,

concurred in the statement of Judge Prettyman and Judge Bazelon concurred in the result effected by the court's order of September 6.

JURISDICTION

The *per curiam* order of the Court of Appeals (Pet. App. 1a) was entered on September 6, 1960. The petition for a writ of certiorari was filed on September 16, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court was correct in dismissing petitioner's complaint for a declaratory judgment seeking a determination that an order on behalf of the Senate Subcommittee on Internal Security is unlawful and void.

2. Whether on the facts alleged in the complaint petitioner's suit for injunctive relief against the United States Attorney and the Senate Sergeant-at-Arms was properly dismissed.

STATUTE INVOLVED

Section 1 of the Declaratory Judgment Act, 62 Stat. 964, 28 U.S.C. 2201, provides as follows:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

On June 18, 1960, petitioner was served with a subpoena directing that he appear on June 20 before a Subcommittee of the Committee on the Judiciary, United States Senate, To Investigate the Administration of the Internal Security Act and Other Internal Security Laws. The subpoena was signed by Senator James O. Eastland, Chairman of the Committee and Subcommittee, and was served by Joseph C. Duke, Sergeant-at-Arms, United States Senate. On June 20, 1960, petitioner appeared as ordered, and the hearing was continued to June 21, 1960. Petitioner appeared on June 21 before the Subcommittee. The hearings of that date were presided over by Senator Thomas J. Dodd, Vice Chairman,[1] who, at the close of the hearing, "on behalf of the Senate Internal Security Subcommittee of the Judiciary Committee of the Senate of the United States," ordered and directed petitioner as follows:[2]

> * * * to appear * * * [before the Subcommittee] and to bring with you all signatures or purported signatures to the petition presented

[1] In addition to Senator Eastland, Chairman, and Senator Dodd, Vice Chairman, the Subcommittee includes Senators Johnston, McClellan, Ervin, Hruska, Dirksen, Keating and Cotton.

[2] The quotations are from p. 30 of the galley proofs of the Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 86th Cong., 2d Sess., *Testimony of Dr. Linus Pauling*, June 21, 1960, Part 2. The transcript of the June 21 hearing is incorporated by reference in Paragraph IV of petitioner's complaint and a galley proof of the transcript is included as a part of the record in this Court.

> by you to the Secretary General of the United Nations on January 15, 1958, together with all letters of transmittal by which, or in connection with which, such signatures were transmitted to you or received by you.[3]

Petitioner's reappearance was originally set for August 9, 1960, was subsequently reset for September 15, 1960, and is now scheduled for October 11, 1960.[4] The petition to the United Nations, referred to by Senator Dodd, was prepared by Dr. Pauling, contains the signatures of over 11,000 scientists from 49 countries, and urges "an international agreement to stop further testing of nuclear bombs by all the countries of the world engaging in such testing."[5]

On August 4, 1960, petitioner commenced this suit against the Chairman and Vice Chairman of the Subcommittee, the Senate Sergeant-at-Arms, and the United States Attorney for the District of Columbia. As to Senator Dodd, the complaint seeks (1) a declaratory judgment and decree "declaring his [petitioner's] rights and duties in connection with, arising out of, and pertaining to" the order and direction by Senator Dodd on June 21; (2) a judgment declaring the order of June 21 "to be null and void and of

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[3] At the June 21, 1960, hearing before the Subcommittee, Dr. Pauling agreed to conform to the Subcommittee's request to furnish the names of people to whom he sent a letter requesting the circulation of the petition to the United Nations. He declined, however, to conform to the request for the names of individuals who transmitted to him papers bearing one or more signatures to the petition. Galley proof, pp. 23–25.

[4] On September 8, 1960, by letter from Senator Dodd to petitioner's counsel, petitioner's appearance before the Subcommittee was postponed from September 15 to October 11, 1960.

[5] Complaint, ¶ IV.

no legal force or effect and violative of the rights of the [petitioner] guaranteed by the First and Fourth Amendments * * *." The order, it is alleged, deprives petitioner of freedom of conscience, freedom of speech, freedom of the press, freedom of assembly and constitutes an unreasonable search and seizure of petitioner's papers and effects. The complaint further alleges that the papers that are the subject of the order are not pertinent to any lawful inquiry of the Subcommittee.[6] The complaint states that there is a controversy between petitioner and Senator Dodd as to the legality of the order and an "identical controversy" obtains between petitioner and Senator Eastland and the Senate Sergeant-at-Arms, as agents for the Subcommittee. A controversy is also said to exist between petitioner and Senators Eastland and Dodd and the Sergeant-at-Arms as to petitioner's rights and duties pertaining to, and arising out of, the order.[7]

As it pertains to the United States Attorney for the District of Columbia, the complaint alleges that, in the event of noncompliance by petitioner with the June 21

[6] In paragraph VII of the complaint, the petitioner states that he is willing to comply with a portion of the June 21 order, namely, to submit the signatures to the United Nations petition of residents of the United States. With respect to signatories from other countries, the complaint alleges that the Subcommittee exceeded its jurisdiction and asks for a judicial ruling as to whether petitioner is lawfully required to submit these signatures. By letter of September 1 to the Court of Appeals and following oral argument on petitioner's appeal, petitioner formally withdrew the claim set out in paragraph VII "and that issue is eliminated from the case."

[7] Complaint, ¶ IX.

directive, the United States Attorney will file an information charging petitioner with the commission of a criminal offense; and in the alternative will submit the matter to a grand jury for indictment under the provisions of 2 U.S.C. 192. Petitioner asks for an injunction restraining the United States Attorney from enforcing the June 21 order and/or prosecuting petitioner for any alleged crime for refusal to comply with the order.[5]

On respondents' motion, the District Court dismissed the complaint. In its oral remarks, the court said (Tr. 40–41):

> I am of the opinion that the challenged order is not subject to a judicial review in this proceeding. I am further of the opinion that the plaintiff here has a plain, adequate and complete remedy at law in the event of any proceedings against him. And I am further of the opinion that the relief sought in the complaint would require an unauthorized interference with the legislative branch of the Government * * *.

An order of dismissal was entered on August 23, 1960, and a notice of appeal was filed on the same date. A motion for stay pending appeal and a motion to submit petitioner's appeal on the merits were filed with the Court of Appeals; the motion and appeal, with respondents' consent, were argued and submitted on September 1. On September 6, the Court of Appeals (Chief Judge Prettyman, Judges Bazelon and Bastian), *per curiam*, ordered that the motion for a stay be denied and that the judgment of the District Court

[5] Complaint, ¶¶ X, XI.

be affirmed. In the court's order, each judge reserved the right to file a statement as to his views. Chief Judge Prettyman's views, later concurred in by Judge Bastian, appear in a statement filed on September 7 (Pet. App. 2a–8a). In sum, Chief Judge Prettyman states that the courts have no power in the present proceeding to pass, either by injunction or declaratory judgment, upon the validity of the Subcommittee order. Judge Bazelon concurs in the result effected by the court's order of September 6, 1960 (App., *infra*, p. 17).

ARGUMENT

1. The complaint filed in this case is an unprecedented attempt to require the courts of the United States, in advance of any immediate deprivation of rights or liberty or any immediate threat of deprivation, to declare the legal rights and obligations of petitioner with respect to an order to appear issued by a Congressional subcommittee, but not yet implemented or sought to be implemented in any way. There are, of course, fundamental obstacles which stand in the way of a federal court's entertaining such a suit or granting the relief which petitioner seeks.

(*a*) Petitioner invokes (Pet. 11–13) the Declaratory Judgment Act, 22 U.S.C. 2201, *supra*, p. 2, as authority for an award of relief to him. The Declaratory Judgment Act, however, is procedural only,[9] not a grant of jurisdiction, and the remedy which it affords is available only where an "actual controversy," in a constitutional sense, is presented.[10] And "[t]he

[9] *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240.

[10] *Ibid.*; see, also, *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 671–672.

requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit."[11] Judged by these tenets, the dismissal of petitioner's complaint was clearly correct.

Though the complaint ends by alleging the existence of a controversy,[12] the facts set out in the preceding allegations of the complaint make it plain that at this point in time there is no justiciable controversy before the Court. The Subcommittee's order to which the complaint is addressed requires only that petitioner, on his reappearance, bring with him certain documentary data (*supra*, pp. 3–4). The date for complying with the Subcommittee order has not yet arrived and an order to turn the documentary data over to the Subcommittee has not yet been issued. Petitioner anticipates such an order but until it issues it cannot be said that the Subcommittee has rejected his legal and non-legal objections to submitting the data to the Subcommittee. Moreover, the petitioner has not been cited by the Senate for contempt, nor has the United States Attorney been asked to prosecute. There is, in short, no present deprivation or denial of asserted constitutional rights; there is no detention and no present basis for any threat of detention, or even threat of prosecution. At this time the questions posed by the complaint arise wholly in the abstract—

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[11] *Federation of Labor* v. *McAdory*, 325 U.S. 450, 461; see also, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 325; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90–91; *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 672–673; *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 242–243.

[12] Complaint, ¶ IX.

on petitioner's own hypothesis of what the course of events will be—and a judicial declaration at this stage would be purely of an advisory nature. In such circumstances, it cannot be said that a controversy exists such as might bring this case within the constitutional and statutory bounds of judicial power. See the cases cited, *supra*, pp. 7, 8, fns. 9, 11.[13]

(*b*) Jurisdictional considerations aside, the remedy made available by the Declaratory Judgment Act confers a discretion on the courts rather than an absolute right upon the litigant." " * * * [T]he propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power * * *." *Pub-*

[13] The cases cited by petitioner (Pet. 12–13) are not to the contrary. In *Evers* v. *Dwyer*, 358 U.S. 202, an existing deprivation of constitutional rights was alleged and the record disclosed that enforcement of the allegedly unconstitutional statute would be continued. 358 U.S. at 203–204. In *McGrath* v. *Kristensen*, 340 U.S. 162, there was an existing dispute over the right of an alien to be considered for suspension of deportation. In *Brownell* v. *Tom We Shung*, 352 U.S. 180, the question was whether, procedurally, an alien exclusion order could be reviewed exclusively in a habeas corpus proceeding. The question of whether an "actual controversy" was present was not involved; such an existing controversy was conceded. Nor was such a question involved in *Santa Fe Pacific R.R. Co.* v. *Lane*, 244 U.S. 492. And in *LaCrosse Tel. Corp.* v. *Wis. Board*, 336 U.S. 18, the Court was concerned with the finality of a state court judgment for purposes of its review.

[14] *Federation of Labor* v. *McAdory*, 325 U.S. 450, 471; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431; *Kevoost Mfg. Co.* v. *C-O Two Fire Equip. Co.*, 342 U.S. 180, 183–184; *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 241.

lic Serv. Comm'n v. *Wycoff Co.*, 344 U.S. 237, 243. Considered as a candidate for the exercise of judicial discretion, petitioner's complaint for declaratory relief was properly dismissed.

Though no injunctive relief against Senators Eastland and Dodd is asked, the declaratory decree which petitioner seeks nonetheless calls for a novel and substantial inroad upon the fundamental constitutional doctrine of separation of powers. As stated by Chief Judge Prettyman (Pet. App. 7a):

> * * *. It is unthinkable to me that, if the Courts should hold a specific directive of a Committee of the Congress unconstitutional and void, the Committee would nevertheless attempt to enforce that directive. So, as I view it, a declaratory judgment would be as effective an impingement upon and interference with legislative proceedings as a flat injunction would be. Thus I think that a declaratory judgment respecting the validity of contemplated Congressional action would violate the doctrine of the separation of powers and would be an illegal impingement by the judicial branch upon the duties of the legislative branch.

An unbroken line of authority confirms that legislative action cannot be interfered with by injunction or mandamus. *McChord* v. *Louisville & Nashville R'd Co.*, 183 U.S. 483, 495; *Hearst* v. *Black*, 87 F. 2d 68 (C.A.D.C.); *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729, three-judge court (D.D.C.); *Fischler* v. *McCarthy*, 117 F. Supp. 643 (S.D.N.Y.), affirmed, 218 F. 2d 164 (C.A. 2); *Trimble* v. *Johnston*, 173 F. Supp. 651 (D.D.C.);

Mins v. *McCarthy*, 209 F. 2d 307 (C.A.D.C.); see also, *Local 107* v. *McClellan, et al.*, No. 629, Oct. Term 1958, certiorari denied, 358 U.S. 947.

The compelling considerations underlying the judicial restraint which has been exercised in injunctive suits against the Congress [15] are even more pertinent here where the essentially equitable remedy of a declaratory judgment [16] is invoked as a vehicle for an unprecedented incursion upon the legislative domain. "A maximum of caution is necessary * * * where a ruling is sought that would reach far beyond the particular case." *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 243. If the declaratory remedy were to be held to extend to the present situation, then it would appear that the courts should be prepared to assume a general superintendence and

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[15] "* * * The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference.

"The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. * * *." *Hearst* v. *Black*, 87 F. 2d 68, 71–72 (C.A.D.C.).

[16] *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431.

power of pre-audit over the inquiries of Congressional committees. Actual or potential witnesses will be free to resort, in advance, to the courts to test what questions they should answer and what documents they should produce. We need not spell out the drastic and novel impact of such judicial interventions on the processes of legislative inquiry.

(*c*) Furthermore, the nature of the questions which this complaint poses for judicial decision is such as would of itself warrant denying the declaratory remedy which petitioner seeks. Apart from the question of the authority of the Subcommittee to make the demand which it has made upon petitioner,[17] the complaint raises constitutional questions under the First and Fourth Amendments. The decisions of this Court, however, uniformly teach that it is in the public interest to avoid possibly needless determinations of constitutional questions.[18] And the force of this doctrine of judicial restraint is worthy of particular emphasis where, as here, the disagreement has not as yet "taken on fixed and final shape,"[19] and may never do so. Cf. *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431–432.

(*d*) If the convenience or private interest of petitioner were the sole consideration (see Pet. 10–13) in determining whether to grant or withhold

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[17] See S. Res. 366, 81st Cong., 2d Sess.; S. Res. 242, 86th Cong., 2d Sess.

[18] *E.g.*, *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 243; *Federation of Labor* v. *McAdory*, 325 U.S. 450, 471; see also, *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431; cf. *United States* v. *Rumely*, 345 U.S. 41, 43, 46.

[19] *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 244.

the declaratory remedy at this stage, a case for granting the remedy could perhaps be made. But considerably more than his private interest or convenience is at stake. Involved in his claim for judicial help at this time are principles of separation of powers, of the limits and restrictions on judicial action, of wise discretion in the use of an equitable remedy, and of the constitutional requirements of federal adjudication. All these weigh heavily against the judicial intervention petitioner seeks.

If to deny the remedy and to remit petitioner to his private counsel puts a burden upon him and places him on a path he regards as perilous, his burden and peril are no greater than many others have borne when faced with a dilemma similar to his. Instances abound when a citizen, without benefit of judicial advice, must conscientiously make elections as to whether a particular course of conduct is to be pursued.[20] In due course and at a proper time, the power of the judiciary may become available to test the legality of a decision—as the past and pending cases in this Court, to which petitioner refers, attest (Pet. 5–6). If the Subcommittee demands the data from petitioner, if petitioner persists in his stated refusal to submit the data to the Subcommittee, if his refusal results in a contempt citation by the Senate, and if he is detained by the Senate, or if contempt proceedings are initiated under 2 U.S.C. 192, 194, then and only then may the courts

[20] *E.g.*, *Raley* v. *Ohio*, 360 U.S. 423, 442; *Barenblatt* v. *United States*, 360 U.S. 109, 138–139 (dissenting opinion); *Sinclair* v. *United States*, 279 U.S. 263, 299; cf. *United States* v. *Woodbury*, 263 F. 2d 784, 787–788 (C.A. 9).

properly pass upon the authority of the Subcommittee and upon petitioner's constitutional objections to the existing and anticipated demand of the Subcommittee. Cf. *United States* v. *Rumely*, 345 U.S. 41; *Watkins* v. *United States*, 354 U.S. 178; *Barenblatt* v. *United States*, 360 U.S. 109; *Quinn* v. *United States*, 349 U.S. 155; *Emspak* v. *United States*, 349 U.S. 190; *McGrain* v. *Daugherty*, 273 U.S. 135; *Sinclair* v. *United States*, 279 U.S. 263.[11]

2. "With respect to the respondents Joseph C. Duke and Oliver Gasch, the petitioner seeks [injunctive] relief against them, only in the event that the Court should determine that it has no jurisdiction to grant the relief prayed for against the respondent Thomas J. Dodd * * *" (Pet. 19). The considerations militating against entertaining the complaint for declaratory relief apply with equal force to the injunctive feature of this suit. There is no presently existing "case or controversy" as to the United States Attorney and the Senate Sergeant-at-Arms; and there is no present threat of criminal prosecution or of detention by the Senate and no immediate basis for either. In these circumstances there is no ground whatever for equitable intervention and it is entirely beside the point that in exceptional circumstances threatened criminal persecutions may be the subject of injunction. Cf. *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 95.

[11] It may be that the role of the courts will differ, depending upon whether Congress punishes contempt through its own processes or whether resort is had to 2 U.S.C. 192 (see *Watkins* v. *United States*, *supra*, at 216, Frankfurter, J., concurring). In the present case, of course, it is not known what route would be followed if the Senate did proceed against petitioner.

CONCLUSION

The dismissal of petitioner's complaint was clearly correct and in accord with established principles; there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1960.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 15,963

LINUS PAULING, APPELLANT *v.* JAMES O. EASTLAND, ET AL., APPELLEES

Before: PRETTYMAN, *Chief Judge,* and BAZELON and BASTIAN, *Circuit Judges,* in Chambers.

ORDER

Circuit Judges Bazelon and Bastian having decided not to file separate statements as to their views with respect to the action of the court September 6, 1960, denying a stay and affirming the judgment of the District Court in this case, it is

ORDERED by the court that the following paragraphs be added to the statement of Chief Judge Prettyman filed herein September 7, 1960:

Circuit Judge Bastian concurs in the foregoing statement.

Circuit Judge Bazelon concurs in the result.

Per Curiam.

Dated: September 14, 1960.

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